



DEPARTMENT OF DEFENSE

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Office of the Secretary

32 CFR Part 339

[Docket ID: DoD-2020-OS-0019]

RIN 0790-AK97

DoD Guidance Documents

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Final rule.

SUMMARY: This final rule sets forth the Department of Defense's (DoD) policies and processes governing the issuance and use of guidance documents. By issuing this final rule, DoD also responds to the Executive Order titled: "Promoting the Rule of Law Through Improved Agency Guidance Documents," which requires federal agencies to finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents.

DATES: Effective Date: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER.

FOR FURTHER INFORMATION CONTACT: Patricia Toppings, 571-372-0485.

SUPPLEMENTARY INFORMATION:

This final rule codifies the Department's policies and procedures regarding guidance documents. The policies and procedures in this final rule apply to all non-exempt DoD guidance documents, which DoD defines in § 339.1. These procedures require all DoD guidance documents to receive appropriate coordination and review. Before guidance documents are issued, they must be reviewed to ensure they are written in plain language and do not impose any substantive legal

requirements on the public above and beyond statute or regulation. All guidance documents must include a clear and prominent statement effectively stating that the contents of the guidance document do not have the force and effect of law and are not meant to bind the public in any way, and the guidance document is intended only to provide clarity to the public regarding existing requirements under the law or agency regulations. Recognizing the fact that, even though guidance documents are not legally binding, they could nevertheless have a substantial economic impact on regulated entities that alter their conduct to conform to the guidance, this final rule requires a good faith assessment of the cost impact on the public of the guidance document.

This final rule also incorporates other policies and procedures, such as describing when guidance documents are subject to notice and an opportunity for public comment and how they will be made available to the public after issuance. These procedures are intended to ensure that the public has a fair and sufficient opportunity to comment on guidance documents when appropriate and practicable and has access to guidance documents issued by the Department. The final rule also provides a process for interested parties to petition the Department for the withdrawal or modification of guidance documents.

Administrative Procedure

Under the Administrative Procedure Act, an agency may waive the normal notice and comment procedures if the action is a rule of agency organization, procedure, or practice. See 5 U.S.C. 553(b)(3)(A). Since this final rule merely incorporates procedures applicable to the Department's administrative procedures into the Code of Federal Regulations, notice and comment are not necessary.

Rulemaking Analyses

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

This rulemaking is not a significant regulatory action under Executive Order 12866. The Department does not anticipate that this rulemaking will have an economic impact on regulated entities. This is a rule of agency procedure and practice. The final rule describes the Department’s internal policies and procedures for its guidance documents. The Department has adopted these internal policies and procedures as part of its regulatory reform initiative, and has not incurred any additional resource costs in doing so. Regulated entities and the public will benefit from these policies and procedures through increased agency deliberations and more opportunities to comment on guidance documents.

Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs”

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

Since notice and comment rulemaking is not necessary for this rule, the provisions of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C.601–612) do not apply.

Executive Order 13132, “Federalism”

Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This action

has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and it has been determined that this action will not have a substantial direct effect or federalism implications on the States and would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions. Therefore, consultation with the States is not necessary.

Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments"

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175. Because this rulemaking does not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that DoD consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget for each collection of information it conducts, sponsors, or requires through regulations. It has been determined there are no new information collection requirements associated with this final rule.

Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"

It has been determined that this final rule does not contain a Federal mandate that may result in expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

List of Subjects

Administrative practice and procedure, Guidance documents.

In consideration of the foregoing, the Office of the Secretary of Defense adds 32 CFR part 339 to read as follows:

PART 339 - DOD GUIDANCE DOCUMENTS

Sec.

339.1 General.

339.2 Initial review process.

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339.4 Departmental review and submission to OIRA.

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339.6 Non-significant guidance documents.

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339.10 Petitions for guidance.

339.11 Rescinded guidance.

339.12 Exigent circumstances.

339.13 Reports to Congress and GAO.

339.14 Use of guidance documents.

Authority: 5 U.S.C. 552a.

§ 339.1 General.

(a) This part provides policies and procedures governing all phases of issuing, modifying, or rescinding guidance documents within DoD.

(b) Subject to the qualifications and exemptions contained in this part, these policies and procedures apply to all guidance documents intended to have future effect on the behavior of

regulated parties issued by all components of the Department, including regional and district offices.

(c) For purposes of this part, the term *guidance document* includes any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the Department that is intended to have general applicability and future effect on the behavior of regulated parties, but which is not intended to have the force or effect of law in its own right and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556. The term is not confined to formal written documents; guidance may come in a variety of forms, including, but not limited to, letters, memoranda, circulars, bulletins, advisories, and may include video, audio, and Web-based formats. See OMB Memorandum M-20-02, “Guidance Implementing Executive Order 13891, Titled “Promoting the Rule of Law Through Improved Agency Guidance Documents,”” dated October 31, 2019.

(d) This part does not apply to:

(1) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (*e.g.*, case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (*e.g.*, guidance pertaining to the use, operation, or control of a government facility or property), and correspondence with individual persons or entities (*e.g.*, congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;

- (2) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or congressional testimony that do not set forth for the first time a new regulatory policy;
- (3) Rules promulgated pursuant to notice and comment under 5 U.S.C. 553, or similar statutory provisions;
- (4) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);
- (5) Rules of agency organization, procedure, or practice;
- (6) Decisions of agency adjudications under 5 U.S.C. 554, or similar statutory provisions;
- (7) Internal guidance directed solely to the issuing agency or other agencies (or personnel of such agencies) that is not intended to have substantial future effect on the behavior of regulated parties or the public;
- (8) Internal guidance that is made public only because release is required under the Freedom of Information Act or agency disclosure policies;
- (9) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;
- (10) Legal opinions by the Office of Legal Counsel at the Department of Justice.
- (11) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;
- (12) Guidance pertaining to military or foreign affairs functions, or to a national security or homeland security function of the United States (other than guidance documents involving procurement or the import or export of non-defense articles and services);
- (13) Grant solicitations and awards; or
- (14) Contract solicitations and awards.

§ 339.2 Initial review process.

(a) Prior to submitting guidance documents for departmental review, Components seeking to issue, modify, or rescind a guidance document should submit a draft copy of that document, along with the component's designation request (see § 339.5 of this part) and good faith cost estimate (see § 339.3 of this part), to their Federal Register Liaison Officer.

(b) Before such a guidance document can be cleared for departmental review, the appropriate DoD or OSD Federal Register Liaison Officer will review it to ensure that it satisfies the following requirements:

(1) For significant guidance (see § 339.7 of this part), Federal Register required formatting.

(2) The guidance document complies with all relevant statutes and regulations (including any statutory deadlines for agency action);

(3) The guidance document identifies or includes:

(i) The term "guidance" or its functional equivalent;

(ii) The issuing component of the Department;

(iii) A unique identifier, including, at a minimum, the date of issuance and title of the document and its Z-RIN (a regulation identifier number), if applicable;

(iv) The activity or entities to which the guidance applies;

(v) Citations to applicable statutes and regulations;

(vi) A statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and

(vii) A short summary of the subject matter covered in the guidance document at the top of the document.

- (4) The guidance document avoids using mandatory language, such as “shall,” “must,” “required,” or “requirement,” unless the language is describing an established statutory or regulatory requirement or is addressed to DoD staff and will not foreclose the Department’s consideration of positions advanced by affected private parties or is intended to have a substantial future effect on the behavior of regulated parties;
- (5) The guidance document is written in plain and understandable English;
- (6) All guidance documents include the following disclaimer prominently: “The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or departmental policies.”

§ 339.3 Good faith cost estimates.

Even though not legally binding, some agency guidance may result in a substantial economic impact. For example, the issuance of departmental guidance may induce private parties to alter their conduct to conform to recommended standards or practices, thereby incurring costs beyond the costs of complying with existing statutes and regulations. While it may be difficult to predict with precision the economic impact of voluntary guidance, the proposing component of the Department must, to the extent practicable, make a good faith effort to estimate the likely economic cost impact of the guidance document to determine whether the document might be significant. When the component is assessing or explaining whether it believes a guidance document is significant, it will, at a minimum, provide the same level of analysis that would be required for a major determination under the Congressional Review Act (5 U.S.C. Chapter 8). When it is determined that a guidance document will be economically significant (see

§ 339.7(a)(1) of this part), the component must conduct and publish a Regulatory Impact Analysis of the sort that would accompany an economically significant rulemaking (see requirements in E.O. 12866, E.O. 13563, and OMB Circular A-4), to the extent reasonably possible.

§ 339.4 Departmental review and submission to OIRA.

(a) After the appropriate FRLO completes his or her initial review, a guidance document will be internally coordinated within the proposing component and formally coordinated throughout the Department with other components who have equities. Mandatory coordinators on all guidance documents are the Chief Management Officer, Department of Defense and the component's General Counsel.

(b) The proposing component will adjudicate DoD and OSD Component comments and return a final guidance document package to the appropriate DoD or OSD Federal Register Liaison Officer for submission to the Office of Management and Budget (OMB), Office of Information and Regulations Affairs (OIRA) for a significance determination.

(c) Guidance documents deemed by OIRA to be "significant" (see § 339.7 of this part) must be reviewed and approved by the Department's Regulatory Policy Officer before OIRA formally reviews them.

§ 339.5 Designation procedures.

(a) The proposing component will prepare a designation request for guidance documents.

Designation requests must include the following information:

(1) A summary of the guidance document; and

(2) The component's recommended designation of "not significant," "significant," or "economically significant," as well as a justification for that designation.

(b) The appropriate DoD or OSD Federal Register Liaison Officer will seek a significance determination from OIRA for guidance documents in the same manner as for rulemakings. OIRA review will occur prior to the publishing of guidance documents, and with sufficient time to allow OIRA to review the designation request and the guidance document to determine if it meets the definition of “significant” or “economically significant” under Executive Order 13891.

(c) Prior to being published, guidance documents determined to be “significant” or “economically significant” are subject to formal review and interagency coordination by OIRA. The OIRA review, to include interagency coordination, is to be consistent with Executive Order 12866.

(d) Significant guidance documents (see § 339.7 of this part) must be reviewed and approved by the Department’s Regulatory Policy Officer before OIRA formally reviews them.

(e) Once the OMB/OIRA has cleared a guidance document for publication, the appropriate DoD or OSD Federal Register Liaison Officer will coordinate the guidance document with the Defense Office of Prepublication and Security Review (DOPSR). The FRLO will notify the component of DOPSR’s approval and that the guidance document can be approved for Federal Register publication or signed for placement on the central web site.

§ 339.6 Non-significant guidance documents.

(a) If the guidance document is determined to be non-significant within the meaning of § 339.7 of this part, the appropriate DoD or OSD Federal Register Liaison Officer will advise the proposing component to proceed with issuance of the guidance.

(b) For each such guidance document, the proposing component should forward it to the appropriate authority for approval. OSD PSAs or equivalents can delegate in writing the

authority to approve non-significant guidance documents to subordinate officials at or above the level of a General/Flag Officer, Senior Executive Service member, or equivalent. The proposing component should include a statement in the action memorandum to the approving authority that the guidance document has been reviewed and cleared as non-significant by OIRA.

(c) After the approving authority signs the non-significant guidance document, it should be forwarded to the DoD Regulatory Program staff for publication on the department's guidance document website located at <https://open.defense.gov/Regulatory-Program/Guidance-Documents/>.

§ 339.7 Significant guidance documents.

(a) The term “significant guidance document” means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

(1) To lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (a guidance document is economically significant if it meets the criteria in this paragraph);

(2) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;

(3) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended.

(b) The term “significant guidance document” does not include the categories of documents excluded by § 339.1(d) or any other category of guidance documents exempted in writing in consultation with OIRA.

(c) Significant guidance documents, to include economically significant guidance documents, must be reviewed by OIRA under E.O. 12866 before issuance; and must demonstrate compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.

(d) Each proposed DoD guidance document determined by OIRA to be significant must be approved by an OSD Principal Staff Assistant or equivalent appointed by the President.

(e) Significant guidance documents have to be published for notice and comment in accordance with § 339.8 of this part before they can be issued.

§ 339.8 Notice-and-comment procedures.

(a) Except as provided in paragraph (b) of this section, all proposed DoD guidance documents determined to be a “significant guidance document” within the meaning of § 339.7 shall be subject to the following notice and comment procedures. After receiving clearance from OIRA to publish a proposed significant guidance document, the proposing component shall publish a notice in the **Federal Register** announcing that a draft of the proposed guidance document is publicly available on Regulations.gov, shall invite public comment on the draft document for a minimum of 30 days. After the comment period ends, the proposing component shall prepare and post a public response to major concerns raised in the comments, as appropriate, in the docket on Regulations.gov. Then the component will prepare a final notice that will be coordinated within the department and submitted to OIRA for review, interagency coordination, and clearance for publishing in the **Federal Register**. Both the proposed and final notices shall

be approved by the DoD RPO before OIRA review, and by an OSD Principal Staff Assistant or equivalent appointed by the President after OIRA clearance and DOPSR approval.

(b) The notice and comment requirements of paragraph (a) of this section will not apply to any significant guidance document or categories of significant guidance documents for which the proposing component finds, in consultation with their component OGC and OIRA, good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons therefor in the guidance issued).

§ 339.9 Public access to effective guidance documents.

(a) The DoD Regulatory Policy Team shall:

- (1) Ensure all final guidance documents in effect are identified by a unique identifier which includes, at a minimum, the document's title and date of issuance or revision and its Z-RIN, if applicable, are published and maintained on a central website located at <https://open.defense.gov/Regulatory-Program/Guidance-Documents/> in a single, searchable, indexed database, and available to the public;
- (2) Note on its website that guidance documents do not bind the public, except as authorized by law or as incorporated into a contract;
- (3) Announce on its website a means for the public to comment electronically on any guidance documents that are subject to the notice and comment procedures; and
- (4) Receive complaints from the public that a component of the Department is not following the requirements of OMB's Memorandum M-20-02, "Guidance Implementing Executive Order 13891, Titled "Promoting the Rule of Law Through Improved Agency Guidance Documents",'' dated October 31, 2019, or is improperly treating a guidance document as a binding requirement.

(b) Each component responsible for issuing guidance documents shall:

(1) Submit final guidance documents to the DoD Regulatory Policy Team at the email address osd.mc-alex.ocmo.mbx.guidance-documents@mail.mil for posting to the Department's central website.

(2) Address complaints from the public that they are not following the requirements of OMB's Memorandum M-20-02, "Guidance Implementing Executive Order 13891, Titled 'Promoting the Rule of Law Through Improved Agency Guidance Documents'," dated October 31, 2019, or are improperly treating a guidance document as a binding requirement.

§ 339.10 Petitions for guidance.

(a) Any person may petition the Department to withdraw or modify a particular guidance document by sending a written request to the DoD Regulatory Program staff at email address osd.mc-alex.ocmo.mbx.guidance-documents@mail.mil. Please use the words "GUIDANCE: [Insert the title of the guidance document]" in the subject line of the e-mail message. The DoD Regulatory Program staff will provide the request to the issuing component of the guidance document for response.

(b) The issuing component should respond to all requests within 90 days after receipt of the request, or as timely as possible given any constraints of the request. For recordkeeping purposes, the issuing component will provide a copy of their response to the DoD Regulatory Program staff at email address osd.mc-alex.ocmo.mbx.guidance-documents@mail.mil.

§ 339.11 Rescinded guidance.

(a) All effective guidance documents must appear on the central website. If the guidance document does not appear on the central website, the guidance is rescinded and without effect.

(b) No component may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.

§ 339.12 Exigent circumstances.

In emergency situations or when the proposing component is required by statutory deadline, court order, or executive order to act more quickly than normal review procedures allow, the proposing component shall coordinate with OGC and the appropriate DoD or OSD Federal Register Liaison Officer to notify OIRA as soon as possible and, to the extent practicable, shall comply with the requirements of this part at the earliest opportunity.

§ 339.13 Reports to Congress and GAO.

Upon the issuance of a final guidance document, the appropriate Federal Register Liaison Officer will submit a report to Congress and GAO in accordance with the procedures described in 5 U.S.C. 801 (the “Congressional Review Act”). If the CRA procedures are not followed, the guidance document can be nullified.

§ 339.14 Use of guidance documents.

Guidance documents cannot create binding requirements that do not already exist by statute or regulation. Accordingly, noncompliance with guidance documents cannot be used as a basis for proving violations of applicable law. Guidance documents can do no more, with respect to prohibition of conduct, than articulate the Department’s understanding of how a statute or regulation applies to particular circumstances.

Dated: May 26, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer,

Department of Defense.

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